

Office of the City Attorney

July 29, 2019

Via CMRRR: 7012 3460 0003 2790 0239

Honorable Ken Paxton
Attorney General
Open Records Division
P. O. Box 12548
Austin, Texas 78711-2548

Re: Public Information Decision Request (Our File No. 2504)

Dear Mr. Paxton:

The City of Lubbock ("City") is requesting an Open Records Decision from your office as it received a request on July 8, 2019, for information pertaining to third-party proprietary information regarding facial recognition technology. A copy of the request is enclosed herein as **Exhibit A**. The City has not yet released any of the information because some of the Act's exceptions may apply.

The City's initial letter request to your office was dated July 22, 2019, and is enclosed herewith as **Exhibit A-1**. The City is requesting a decision from your office pursuant to Chapter 552 of the Texas Government Act, also known as the Public Information Act ("Act") as the requested information may be confidential. In accordance with Section 552.301(e)(1)(D), a portion of the requested information is enclosed herewith as: **Representative Samples—Exhibits D, E, E-1, E-2, E-3 and E-4**.

The City is raising the following exceptions in its request:

Section 552.107 (exception for certain legal matters; information within the attorney-client privilege);

Section 552.108 (certain law enforcement and prosecutorial information);

Section 552.111 (exception pertaining to agency memoranda);

Section 552.122 (exception pertaining to test items);

Section 552.136 (exception for information considered access device numbers); and

Section 552.305 (exception for information involving privacy or property interests of a third party).

Section 552.107 — Exception as to certain legal matters; information within the attorney-client privilege

The City respectfully asserts that Section 552.107 applies to some of the requested information as it constitutes privileged documented communications involving the City Attorney's Office (*see Exhibit D—Representative Sample*). This exception states that information is excepted from the requirements of the Act when:

...[I]t is information that ... attorney of a political subdivision is prohibited from disclosing because of a duty to the client under *the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct*. [emphasis added]

In this case, the Requestor has asked for information which involves communication with attorneys for the City (*see Exhibit D—Representative Sample*). This information has not been released to any third parties. The City asserts that Section 552.107 excepts releasing any legal opinions and communications created for the City. In Open Records Decision No. 574 (1990), your office determined that communications within the attorney-client privilege were protected by this exception. This exception includes, as held by your office, factual information, requests for legal advice made by the client to the attorney, and legal advice or opinions rendered by the attorney to the client in furtherance of the rendition of legal services. *See* Open Records Decision No. 574. The requested information includes communications between the client and the attorneys; therefore, it should remain confidential pursuant to Section 552.107 of the Act.

Further, your office has held that notes made by an attorney were also excluded to the extent that they show client confidences, the attorney's legal advice, or opinion communicated to the client. *See also* Open Records Decision No. 589 (1991), (excluding attorney fee bills if they reveal client confidences or attorney advice); and Open Records Decision No. 412 (1984). As the requested information includes communications of attorneys with their client, it should remain confidential pursuant to Section 552.107 of the Act. The City's attorneys are noted herewith in **Exhibit D—Representative Sample**.

Section 552.108 — Exception for information related to internal records of a law enforcement agency

The City further asserts that portions of the requested information are excepted from disclosure pursuant to Section 552.108 of the Act (*see Exhibit E-1*). Particularly, Section 552.108(b)(1) of this provision excepts such information because it is "[a]n internal record or notation of a law enforcement agency...that is maintained for internal use in matters relating to law enforcement" and the release of which "would interfere with law enforcement."

Your office has ruled that in raising this exception, the agency claiming it must reasonably explain, if the information does not explain on its face, how releasing the information would interfere with law enforcement. Open Records Decision No. 434 (1986). Furthermore, your office has previously held that portions of police procedures are excepted under this section because the release of the information would impair an officer's ability to enforce the law and would place individuals at an advantage in confrontations with the police. Open Records Decision No. 531 (1989).

Some of the requested information may reveal information that would interfere with law enforcement (*see Exhibit-1*). First, the information would reveal how the software would work in detecting criminal activity and identifying suspects. If this information were released, it could enable potential suspects to avoid detection by the software. It would hinder police investigations and crime detection. Therefore, the City respectfully requests that the tactical information remain confidential.

Section 552.111 (exception pertaining to agency memoranda)

The requested information may be excepted from disclosure as agency memoranda pursuant to Section 552.111 of the Act. In particular, the information may be excepted by the deliberative process privilege as it is adopted pursuant to Section 552.111 (*see Exhibit E-2*).

This privilege protects advice, opinions, and recommendations in the decisional process and exists to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). Your office, in Open Records Decision No. 615 (1993), section 52.11 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. As the court in *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 364 (Tex. 2000) states, "We recognize that public disclosure of agency communications reflecting deliberative processes on any subject, even non-policy communications, could have a chilling effect on agency employees' communications in the future." The privilege is designed to promote the frank discussion of policy matters.

A governmental body's policymaking functions do include administrative matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Furthermore, your office has determined that it includes communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for a governmental body by an outside consultant acting at a governmental body's request and performing a task that is within a governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with a party with whom a governmental body has privity of interest or a common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants).

In this instance, the requested documents include various draft police policies regarding automated license plate recognition and facial recognition software usage (*see Exhibit E-2*). The drafts included in the requested documents could become an official policy of the City's Police Department. This information is currently in draft form and includes differing variations and forms of a proposed policy. Ultimately, the draft policies evidence the discussions of a final policy and should be a protected deliberative process by section 552.111 of the Act.

Section 552.122 (exception pertaining to test items)

Section 552.122(b) of the Government Code excepts from disclosure test items developed by a governmental body. In Open Records Decision No. 626 (1994), your office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated. Section 552.122 generally applies in cases where release of "test items" might compromise the effectiveness of future examinations. *See* Open Records Decision No. 626 at 4-5. Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *Id.* at 8 (1994).

In this case, the Requestor has asked for information that includes test questions demonstrating the ability to use the automated license plate recognition and facial recognition software (*see Exhibit 3*). Passage of the test is required in order to obtain privileges to utilize the software. The City would use this test in order to ensure the qualifications of the person operating the software and to avoid mistakes. Release of these questions would compromise the effectiveness of the City's training program and hinder the City's ability to qualify staff to use the software.

Section 552.136 (exception as to access device number information)

The City is raising the exception for access device numbers. Under this exception, the Act excepts personal identification numbers from disclosure. The information enclosed herewith as **Exhibit 4** includes insurance policy numbers of a third party, which in turn provides personal identifying information regarding the third party. As such, this information should remain confidential. These numbers are protected by Section 552.136 of the Act because they can be "...used alone or in combination to obtain money, goods, services, or another thing of value or initiate a transfer of funds." *See* Section 552.136 and Open Records Decision No. 684 at 9 (2009).

Section 552.305 (exception for information involving privacy or property interests of a third party)

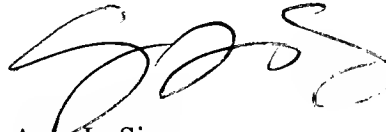
Finally, the City initially raised on July 22, 2019 (*see Exhibit A-1*), and now again raises the following argument in regard to the instant request (*see Exhibit A*). The Requestor has asked for information the City believes is protected from disclosure by Section 552.305—information involving privacy or property interests of a third party. Pursuant to Section 552.305, the City believes the information may contain third-party proprietary information (*see Representative Samples—Exhibits E, E-1, E-2, E-3 and E-4*). The City continues to defer to the third party as to

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the relevance of this section. The City previously notified such third party of this request as indicated in **Exhibit C** enclosed herein.

Thank you very much for your consideration of these matters. Please do not hesitate to call or write if you need information with regard to this request for a decision.

Yours truly,



Amy L. Sims
Deputy City Attorney

ALS:dm

Enclosures: Exhibits A, A-1, C; and
Representative Samples—Exhibits D, E, E-1, E-2, E-3 and E-4

cc: w/Letter Brief Encl.

Via CMRRR: 7012 3460 0003 2790 0246

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